HONGKONG BANK MALAYSIA BHD

v.

PERCETAKAN NASIONAL MALAYSIA BHD

HIGH COURT MALAYA, KUALA LUMPUR
JAMES FOONG J
[ORIGINATING SUMMONS NO: S5-24-727-1998]
4 MARCH 1999

BANKING: *Banking Business - Unclaimed moneys - Extent of bank's duty to forward list of all unclaimed moneys - Whether bank must advertise list in gazette - Unclaimed Moneys Act 1965, s. 10(2)*

The plaintiff forwarded to the defendant a list of all unclaimed moneys in its register to be published in the gazette. The defendant charged a fee of RM31,600 for the publication. Though the plaintiff paid the fee, it contended that pursuant to s. 10(2) of the Unclaimed Moneys Act 1965 ('the Act'), no fee will be payable for such publication and thus the plaintiff filed an originating summons seeking, *inter alia,* a true construction of the said provision and the refund of the money.

Held:

[1] The defendant is a separate legal entity created under the Companies Act. Though it has an agreement with the Government of Malaysia to carry out certain operations, its obligation is only toward the government and it is not bound by s. 10(2) of the Act.

[2] Being a separate entity, the defendant can enter into any contract with any party subject to the terms of the privatisation agreement with the Government of Malaysia. The defendant has every right to request a fee for their service and though the payment of the consideration was made under protest, a binding legal agreement had already come into existence. There is no justification to request for a return of the consideration upon a contract properly made when the defendant had not breached any of the terms of the contract.

[3] Section 10(2) of the Act merely imposes a duty on the plaintiff to forward the list to "the director general of government printer" and there is no further obligation on the part of the plaintiff to ensure that the list is advertised.

[4] As the post of "the director general of government printer" has been abolished, the list should be forwarded to the chief secretary to the government.

[Plaintiff's action dismissed.]

Legislation referred to:
Contracts Act 1950, s. 24(b)
Unclaimed Moneys Act 1965, s. 10(2), (5)

For the plaintiff - Sanjay Mohanasundram; M/s Lee Hishamuddin
For the defendant - HP Ting (SK Ng with him); M/s Amin Tan & Co
For the third party - Khatijah Idris; Finance Ministry

Reported by Izzaty Izzuddin

JUDGMENT

James Foong J:

The Issue

The plaintiff is a bank. On or about 26 March 1996, as required by s. 10(2) of the Unclaimed Moneys Act 1965 (the Act), they forwarded to the defendant a copy of all unclaimed moneys in its register of that period (the material) for the purpose of advertisement in the gazette. They received a reply from the defendant on 27 April 1996 to say that the charges involved for such publication was RM31,600. This was paid under protest by the plaintiff for they claimed that under s. 10(2) of the Act "no fee shall be payable" for such publication. A clarification was sought by the plaintiff through their association (the Association of Banks in Malaysia) from Bank Negara on whether the defendant can charge such fee for the publication of the material. Though the reply from Bank Negara seems to indicate that no such payment is required, the defendant refused to refund to the plaintiff the sum so paid under protest. Dissatisfied, the plaintiff now seeks from this court:

(1) a declaration that upon a true construction of s. 10(2) of the Act, the defendant is not entitled to claim the costs of publication and advertisement in the gazette of the copy or copies of entries of unclaimed monies held by the plaintiff;

(2) an order that the defendant do pay the plaintiff from the date of the order made herein, the sum of RM31,600 together with interest thereon at the rate of 8 per cent per annum from 10 July 1996; and

(3) costs.

Pursuant to an order to issue third party notice, the Kementerian Kewangan Malaysia joined in this proceeding as a third party. By the contents of the affidavit of its legal officer, affirming for and on behalf of the Ministry, the third party seems to support this plaintiff's application.

For the defendant, the defence is rather a simple one. They asserted that they are an incorporated legal entity of limited liability. Except for a privatisation agreement (the privatisation agreement) dated 30 December 1992 with the Government of Malaysia to take over and carry out the operations of printing, publication, production and distribution of all documents previously done by the government printer (the operations), they are not a government department, nor is their chief executive or operating officer the director general of government printer at any material time. As a private enterprise, they are allowed to charge for printing and publishing of the material forwarded to them by the plaintiff for advertisement in the gazette. They then proceeded to point out that even under the privatisation agreement, all materials forwarded to them for the operations by the Government of Malaysia, through its ministries and agencies, are charged on a scale fee set out in the agreement and paid for by the authorities.

Analysis

From the above, it is obvious that someone in the course of this privatisation exercise had overlooked s. 10(2) of the Act, by not making any provision in the privatisation agreement to accommodate the publication of the material without charge. This court is now called upon to resolve this muddle through the prayers sought in this application. To approach it, I reckon that the first step is to examine s. 10(2) of the Act. It states:

> the company or firm shall annually, during the month of March, forward to the Director General of Government Printer a copy of all such entries in the register, which shall include unclaimed moneys held up to the end of February of that year, for advertisement in the gazette, for which no fee shall be payable.

Then upon perusal of the terms of the privatisation agreement I discovered that the defendant has taken over from the government printing department not only the operations but also its staff and assets. In consideration for this, the defendant, *inter alia*, agrees to carry out the operations required by the government ministries, departments and agencies for a fee; the amount and the rate are based on a certain agreed formula. There is no provision in this privatisation agreement for any free publication. Due to this arrangement, this court is informed by the third party that even the post of director general of government printer no longer exists.

Though recognising this situation, the plaintiff in their determination to convince this court that the defendant should advertise the material in the gazette without charging any fee advanced three contentions. The first is the existence of a clause (cl. 18) in the privatisation agreement which states that the defendant must "comply with the provisions of all Acts, Ordinances, By-Laws, Regulations and Rules for the time being in force in relation to the Privatised Operations." Such expression, in their opinion, should bind the defendant to adhere to s. 10(2) of the Act.

I am not convinced by this proposition. Clause 18 of the privatisation agreement is under the section which bears the heading of "Licences, ETC." Ensuing clauses immediately after this title set out stipulations for the defendant to apply for all licences and approvals to carry out the operations. Thus when one reads cl. 18, which follows immediately after these, it must be in reference to the application of licences, permissions and approvals to carry out the operations. It cannot be interpreted in isolation to cover a general situation. After all, the law implies that everyone must comply with all laws of the land and there is no necessity to repeat this in an agreement.

Plaintiff's counsel then drew my attention to s. 24(b) of the Contracts Act 1950. It states:

> The consideration or object of an agreement is lawful unless – it is of such nature that, if permitted, it would defeat any law.

According to him, by the defendant's insistence to charge for the advertisement of the material to be advertised in the gazette, it would defeat the law laid out under s. 10(2) of the Act thereby rendering the privatisation agreement void.

I do not see the relevance of this in these present circumstances. This court is not called upon to declare the privatisation agreement between the defendant and the Government of Malaysia void; for s. 24 of the Contracts Act provides that: "Every agreement of which the object or consideration is unlawful is void." The plaintiff in fact, is not at all concerned with the arrangement between the Malaysian Government and the defendant to carry out the operations. All they wanted was to have the material advertised in the gazette by whomever authorised to do so with no cost. And as candidly expressed by the plaintiff, they do not wish to fall foul with the law for s. 10(5) of the Act provides:

> In the event of failure to keep or to enter all unclaimed moneys in such register or to forward for advertisement such copy thereof or failure to lodge copies thereof with the Registrar, the company and in a company or firm every officer responsible therefore shall be guilty of an offence punishable with a fine not

> exceeding three thousand ringgit and thereafter with a further fine not less then fifty ringgit and not more than one hundred ringgit for every day during which such default or refusal continues.

The next attempt by the plaintiff's counsel is to convince me that by the nature of the operations under the privatisation agreement, the defendant has assumed the role of the director general of government printer under the Act; thus they are required to advertise the material in the gazette free of charge. Supporting this, he cited the Interpretation Acts 1948 and 1967 where:

> 'Government Printer' includes any printer authorised, either generally or in a particular case or class of cases, to print Acts, Enactments, Ordinances or any other written laws.

I may agree that by the features of the operations the defendant can be classified as government printer, but s. 10(2) of the Act speaks of a person in the form of the director general of government printer. To my mind, the description of this personnel is too specific to be implied that it can be assumed by an individual or firm from the private sector. This designation has all the connotations of an officialdom which is bestowed on government officials appointed to head a particular governmemt department. The administrative authorities of the government may think it appropriate not to appoint any person to this post or may even have abolished it in view of the privatisation agreement, but can this be lawful when express provision of the law, as in this case under s. 10(2) of the Act, specifies such an appointment? I do not think so. Not even the court has such power to change the wishes of Parliament.

Findings

I am more inclined to accept the submission of the defendant. They are a separate legal entity created under the provisions of the Companies Act. Though they have an agreement with the Government of Malaysia to carry out the operations, their obligation is only towards the government. Being a separate entity they can enter into any contract with any party on their operation but, of course, subject to the terms of the privatisation agreement. By this, they are also entitled to negotiate any terms for their service. They are not bound by s. 10(2) of the Act. Thus when the plaintiff forwarded the material to the defendant for advertisement in the gazette, the defendant has every right to request a fee for their service. If this offer was not taken up then no contract was formed. But the plaintiff chose to accept it. Though the payment of the consideration was made under protest, a binding legal agreement came into existence. Now to request this court to return this consideration upon a contract properly made, and when the defendant has not

breached any of the terms of the agreement then, there is no justification under the law to grant it. For these reasons I hereby disallow this plaintiff's application with costs to the defendant.

Of course, more important to the plaintiff now is: what they must do in the future relating to similar matters to the material to be advertised in the gazette. My view is that s. 10(2) of the Act merely imposes a duty on the plaintiff to "forward to the director general of government printer" such matters. As long as this is complied with, there is no further obligation on the part of the plaintiff, by the provision of this law, to ensure that the matter is advertised. Of course, the plaintiff will ask: to whom shall I forward the matter to when, as admitted by the third party, the post of director general of government printer is abolished? My answer is firstly that such post cannot be erased by the administrative authorities when it is specified in an Act of Parliament. If it is, then the matter should be forwarded to the chief administrative officer of the government in the form of the chief secretary to the government. It is for him to either reappoint someone to the post of director general of government printer, or request a relevant ministry of the government, or through its own office forward the matter to the defendant for printing; and no fee can be charged to the plaintiff for such advertisement. It is then up to the Government of Malaysia and the defendant to determine whether any fee is to be paid under the terms of the privatisation agreement. Of course there is always the avenue of requesting the law to be amended, but the form and manner of which is certainly beyond the purview of this court to venture.